

The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

GEORGE JOHNSON,

Plaintiff,

v.

CAMERON WALL and JAMES DANIELS,

Defendants.

Case No. 3:14-cv-05579-BHS

**PLAINTIFF'S RESPONSE TO  
DEFENDANT'S MOTION TO  
DISMISS**

**I. INTRODUCTION**

On December 17, 2013, Defendants—Internal Revenue Service Special Agents—violently forced entry into 81-year-old June Greiner's home to serve a search warrant limited to documents only. Ms. Greiner was not a suspect in the underlying criminal activity and Defendants knew she posed little risk to officers' safety. The incident left Ms. Greiner deeply shaken—besides having to replace her demolished front door, Ms. Greiner suffered from post-traumatic stress disorder until she died in 2020 at the age of 87.

Ms. Greiner initiated this lawsuit on July 17, 2014, but was unable to outlive the litigation delays or those Agents who caused her to suffer harm for the invasion of her privacy and violation of her constitutional rights. Following her death, Ms. Greiner's family—her Estate—chose to continue pursuing redress for the harm that she suffered.

PLAINTIFF'S RESPONSE TO DEFENDANT'S  
MOTION TO DISMISS - 1

1 Defendants now wish to exploit Ms. Greiner's untimely death, seeking dismissal  
2 of the Estate's *Bivens* claim merely because Ms. Greiner died before she had her day in  
3 court. Fortunately, the law does not support such an unjust result.

4 In *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 396 (1971), the  
5 Supreme Court recognized the importance of a remedial mechanism by which victims  
6 of federal constitutional violations by federal agents could recover compensatory and  
7 punitive damages. Several years later, the Court held in *Carlson v. Green*, 446 U.S. 14  
8 (1980) that where a defendant's conduct results in a plaintiff's death, these critical  
9 remedial and deterrent objectives would be undermined if the plaintiff's claims were  
10 extinguished, resulting in undeserved *de facto* immunity for the defendant. Finding the  
11 state's survivorship statute, which would have abated the lawsuit, contrary to these  
12 purposes, the *Carlson* Court chose to apply a uniform federal rule that the representative  
13 of such a plaintiff's estate may prosecute a *Bivens* claims on the decedent's behalf.

14 Though Ms. Greiner's death in this case was unrelated to Defendants'  
15 unconstitutional conduct, there is no legal or equitable justification to treat her *Bivens*  
16 claims any differently than the Plaintiff's in *Carlson*. To the contrary, extinguishing her  
17 *Bivens* claims merely because she could not, at the age of 87, outlive this case's  
18 abnormally long procedural course would provide Defendants an unjustified windfall  
19 and undermine the critical remedial and deterrent justification behind *Bivens*. This is  
20 particularly true in cases involving elderly plaintiffs, where such a rule would permit the  
21 savvy *Bivens* defendant to "wait out" the plaintiff—a zero-risk, high-reward gambit  
22 inconsistent with the purposes underlying the cause of action.

23 It would also run contrary to a significant body of precedential and persuasive  
24 decisions from within the Ninth Circuit establishing that compensatory damages  
25 available under *Bivens* are an archetypical example of the type of remedial claims that  
26 persist beyond a plaintiff's death.

Moreover, notwithstanding the general rule that penal damages allowed by federal *statutes* abate upon a plaintiff's death, the clear import of the Supreme Court's decision in *Carlson* is that punitive damages in the unique context of a *Bivens* claim survive a plaintiff's death as a special remedial sanction crucial to deterring official misconduct. Extinguishing such claims merely because the plaintiff passes away—letting rogue federal official off the hook for their unconstitutional actions—is fundamentally inconsistent with the purposes of *Bivens*.

In seeking dismissal of all Plaintiff's remaining claims, Defendants labor against the clear weight of authority. Forced to distinguish a well-established body of precedent, their primary contention is that a sanction with deterrent objectives cannot—*by definition*—also serve remedial purposes.

Unsurprisingly, this false dichotomy<sup>1</sup> finds no support in the case law; in fact, the Supreme Court in *Carlson* noted that damages under *Bivens* serve *both* remedial and deterrent functions.<sup>2</sup> In short, Defendants' motion to dismiss must be denied. The relief they seek is foreclosed by decades of precedent, and the principle they embrace would do irreparable harm to the purposes underlying *Bivens* – to redress a grave injustice.

## II. ISSUES PRESENTED

Defendants' motion to dismiss presents these primary issues:

1. A *Bivens* action allows a plaintiff to recover compensatory and punitive damages for violations of their federal constitutional rights by a person acting under color of federal law, where there is no adequate statutory remedy. Should the question of whether such a claim survives the plaintiff's death for reasons unrelated to the defendant's conduct turn on federal law, or should courts incorporate state law?
2. Under well-settled federal law, claims that are remedial in nature survive a plaintiff's death, whereas those constituting penalties are

<sup>1</sup> “[A] rhetorical fallacy that assumes that the choice at hand must be between two options and only two options.” False Dichotomy, *Bouvier Law Dictionary* (2012).

<sup>2</sup> “[T]he *Bivens* remedy, *in addition to compensating victims*, serves a deterrent purpose.” *Carlson*, 446 U.S. at 21 (emphasis added).

typically extinguished. Under *Bivens*, a plaintiff may be entitled to recover both compensatory (economic and non-economic) damages, as well as punitive damages under federal common law.

A. Throughout *Bivens* and subsequent decisions, the Supreme Court and lower courts have made clear that compensatory damages are intended to redress individual constitutional injuries and deter official misconduct. Are such damages remedial or punitive in nature, or both?

B. The Supreme Court has described punitive damages in the specific context of a *Bivens* action as “a particular remedial mechanism. . . especially appropriate to redress the violation by a Government official of a citizen’s constitutional rights.” Notwithstanding the general rule that punitive claims allowed under penal statutes are extinguished by a plaintiff’s death, did the Supreme Court intend punitive damages available under *Bivens* to constitute a special component of the remedial sanctions that would survive a plaintiff’s death?

### III. FACTUAL AND PROCEDURAL BACKGROUND<sup>3</sup>

#### A. On December 17, 2013, IRS Agents break down Ms. Greiner’s door while executing a search warrant

On the morning of December 17, 2013, 81-year-old June Greiner was enjoying her routine of a quiet morning, drinking coffee and reading the newspaper at her kitchen table (which was in close proximity to her front door) when she was startled by a crashing noise near her front porch, which sounded as though someone had thrown a large, heavy rock against the front wall of her house. *See* Dkt. #99 at ¶ 3.3. When Ms. Greiner approached her front door, she saw several large men clad in dark clothing and huddled around the front door, talking amongst themselves in muffled tones.

Fearing she was about to become the victim of a home invasion, Ms. Greiner immediately turned back toward her dining area to dial 911. *Id.* at ¶ 3.4. But as she

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<sup>3</sup> The facts underlying this case are set out fully elsewhere in the record before the Court, *see, e.g.*, Dkt. #99, and only those relevant to the issue before the Court and necessary to provide background are repeated here.

1 turned, Ms. Greiner heard a large crash as the men (whom she later learned were federal  
2 agents serving a documents-only search warrant related to an investigation of her  
3 former tenant) busted down her front door.

4 Ms. Greiner was able to get to her phone, but before she could tell the  
5 emergency dispatcher what was happening, a man, later identified as Defendant Wall,  
6 grabbed the phone from Ms. Greiner's hand to prevent her from continuing the call.  
7 Only then did the men identify themselves as law enforcement.

8 **B. On July 14, 2014, Ms. Greiner sues for economic, non-economic, and**  
9 **punitive damages**

10 On July 14, 2014, Ms. Greiner brought suit, alleging claims under *Bivens*  
11 against the agents involved in the raid, violations of the federal knock-and-announce  
12 statute, 18 U.S.C. § 3109, and claims under the Federal Tort Claims Act. The Court  
13 subsequently granted Defendants' motion to dismiss all of Plaintiff's claims, including  
14 her *Bivens* claim. *See* Dkt. #120, 128.

15 Plaintiff timely appealed, and on February 7, 2019, the Ninth Circuit vacated the  
16 Court's orders dismissing Plaintiff's claims and remanded for trial on the  
17 reasonableness of the execution of the search warrant. Dkt. #130. Plaintiff subsequently  
18 dismissed her claims against a number of Defendants, leaving her claims against  
19 Defendants Wall and Daniels. Dkt. #168.

20 **C. Ms. Greiner passes away before her case can proceed to trial**

21 Upon remand, trial was reset for July 6, 2020. Dkt. #184. Unfortunately, Ms.  
22 Greiner passed away on May 11, 2020 at the age of 87. *See* Dkt. #190. The Court  
23 subsequently granted a motion under Rule 25 to substitute Ms. Greiner's son and the  
24 personal representative of her Estate, George Johnson, as Plaintiff. Dkt. #190, 192.

25 Defendants now move to dismiss Plaintiff's *Bivens* claims, asserting they were  
26 extinguished when Ms. Greiner passed away. *See* Dkt. #196.

#### IV. LEGAL STANDARD

##### A. Motion for Judgment on the Pleadings

A motion for judgment on the pleadings is, in all relevant respects, identical to a motion to dismiss under Rule 12(b)(6). *Merchs. Home Delivery Serv. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1488 (9th Cir. 1995). Judgment on the pleadings is only appropriate where, taking all allegations in the plaintiff's complaint as true and drawing all reasonable inferences in the plaintiff's favor, the moving party is clearly entitled to judgment as a matter of law. *Id.*; see also *Klarfeld v. United States*, 944 F.2d 583, 585 (9th Cir. 1991).

##### B. A Plaintiff's *Bivens* claims survives their death under both Washington law and the "uniform federal rule of survivorship"

When a party dies in the course of litigation and their underlying claim is not extinguished by their death, Rule 25(a) permits the court to substitute a representative of the decedent's estate as plaintiff.

Absent a sufficient federal statutory remedy, a *Bivens* claim provides the exclusive mechanism by which the victim of a federal constitutional violation by a person under acting under color of federal law may recover compensatory and punitive damages. See *Carlson*, 446 U.S. at 18 (citing *Bivens*, 403 U.S. at 396). As a cause of action derived from the federal Constitution and designed to vindicate federal constitutional rights, the metes and bounds of a *Bivens* action necessarily flow from federal law. *Id.* (citing *Burks v. Lasker*, 441 U.S. 471, 476 (1979)).

As Justice Brennan expressed in *Bivens*, it should "hardly seem a surprising proposition" that "damages may be obtained for injuries consequent upon a violation of the Fourth Amendment" given t that "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens*, 403 U.S. at

1 397.

2 In *Carlson v. Green*, the Supreme Court held that where a defendant's allegedly  
 3 unconstitutional conduct results in a plaintiff's death, claims under *Bivens* survive the  
 4 plaintiff's death, regardless of the state law, and may be prosecuted by the decedent's  
 5 estate. *Id.* at 23–25. Recognizing the perverse incentives that would result from a  
 6 contrary holding—immunizing federal actors from liability where they kill, rather than  
 7 merely injure—the Court held a uniform rule permitting survival of *Bivens* claims was  
 8 necessary to effectuate the remedial and deterrent objectives underlying the cause of  
 9 action. *See id.* at 23 (“Whatever difficulty we might have resolving the question were  
 10 the federal involvement less clear, we hold that only a uniform federal rule of  
 11 survivorship will suffice to redress the constitutional deprivation here alleged and to  
 12 protect against repetition of such conduct.”).

13 Confining its decision to the facts before it, the Court left open the question of  
 14 whether a plaintiff's *Bivens* claims would survive their death where *unrelated* to the  
 15 alleged constitutional deprivation. *Id.* at 24 n.11. The Court noted the issue could be  
 16 resolved in one of two ways: by reference to the relevant state law “as a matter of  
 17 convenience,” *see id.*, or under the federal common law of survival. *See id.* at 23.  
 18 Ultimately, the Court left the question “for another day.” *Id.* at 24 n.11.

19 Under federal common law, whether a plaintiff's claim persists after her death  
 20 typically turns on whether the claim in question is “remedial” or “punitive.”<sup>4</sup> *See*  
 21 *Wheeler v. City of Santa Clara*, 894 F.3d 1046, 1057 (9th Cir. 2018) (citing *Ex parte*

22 \_\_\_\_\_  
 23 <sup>4</sup> Some district courts have observed the rationale behind the remedial vs. punitive dichotomy—that a  
 24 deceased defendant is beyond punishment—is “not clearly applicable” in cases where the *plaintiff* passes  
 25 away in the course of litigation, and thus in such cases both forms of damages may be pursued by the  
 26 plaintiff's estate. *See Haynes v. R. H. Dyck, Inc.*, No. 2:06-CV-02944-MCE-EFB, 2007 WL 3010574,  
 2007 U.S. Dist. LEXIS 76383, at \*8 (E.D. Cal. Oct. 12, 2007). This reasoning is consistent with the  
 underlying compensatory and deterrent objectives of *Bivens*. *See Carlson*, 446 U.S. at 21. Even so, as set  
 forth below, *even if* the Court determines the punitive vs. remedial framework is applicable, Ms.  
 Greiner's claims survive in full, and thus Plaintiff proceeds to discuss the merits of Defendant's motion  
 under the standard set out in *Wheeler*.

1 *Schreiber*, 110 U.S. 76, 80 (1884)). In making this determination, courts traditionally  
 2 apply a three-factor test: “(1) whether the purpose of the action was to redress  
 3 individual wrongs or more general wrongs to the public; (2) whether the recovery runs  
 4 to the individual harmed or to the public; and (3) whether the recovery was wholly  
 5 disproportionate to the harm suffered.” *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859,  
 6 876 (11th Cir. 1986) (citing *James v. Home Construction Co. of Mobile*, 621 F.2d 727,  
 7 729–30 (5th Cir. 1980)).

8 Following *Carlson*, it appears no Circuit Court of Appeals has considered  
 9 whether a *Bivens* claim survives a plaintiff’s causally unrelated death.<sup>5</sup> At least two  
 10 district courts within the Ninth Circuit have, however. *See Brunoehler v. Tarwater*,  
 11 Case No. CV 15-688-DMG (JEMx), 2020 WL 4352790, 2020 U.S. Dist. LEXIS  
 12 138898 (C.D. Cal. Jan. 31, 2020); *Moss v. Entzel*, Case No. 5:17-cv-02144-PSG  
 13 (MAA), 2020 WL 869918, 2020 U.S. Dist. LEXIS 27244 (C.D. Cal. Feb. 13, 2020).  
 14 Both concluded the issue should be resolved under federal common law, and likewise  
 15 determined compensatory damages under *Bivens* are properly characterized as remedial  
 16 sanctions. *See Brunoehler*, 2020 WL 4352790 at \*1 (“*Bivens* itself suggests it has a  
 17 remedial purpose.” (citing *Bivens*, 403 U.S. at 397)).

## 18 V. ARGUMENT

### 19 A. Under either the Washington state statute or Federal uniform survivorship 20 common law, Plaintiff’s *Bivens* claim survives Ms. Greiner’s death.

21 Defendants agree that under Washington’s survivorship law, Plaintiff’s claims  
 22 for compensatory damages survive her death.<sup>6</sup> *See* Wash. Rev. Code § 4.20.046(1)

23 <sup>5</sup> In *Haggard v. Stevens*, 683 F.3d 714, 716 (6th Cir. 2012), the Sixth Circuit held state law determines the  
 24 survivability of a plaintiff’s *Bivens* claim when the defendant dies, and is thus inapposite to the issue here.

25 <sup>6</sup> With respect to noneconomic damages, Washington law would require the factfinder to determine an  
 26 award of such damages that was “just under all the circumstances of the case.” *Id.* § 4.20.046(2).  
 Washington does not authorize punitive damages unless expressly authorized by statute, and thus whether  
 that component of Ms. Greiner’s claims survived her death would necessarily turn on federal common  
 law



1 (“All causes of action by a person . . . against another person . . . shall survive to the  
 2 personal representatives of the former.”). However, in reliance upon *Carlson*,  
 3 Defendants maintain the federal common law of survival must apply to Plaintiff’s  
 4 *Bivens* claim, largely because applying state law could produce unnecessarily  
 5 inconsistent results. *See* Dkt. #196 at 10. And as the Supreme Court noted in *Carlson*,  
 6 there are “cogent reasons” courts may refrain from incorporating state law where the  
 7 result would be unfair or contrary to the purpose of a *Bivens* claim.<sup>7</sup> 446 U.S. at 24  
 8 n.11. Specifically, the injury alleged in a *Bivens* action involves federal constitutional  
 9 rights injured by those acting under color of federal law, and thus “[n]o state interests  
 10 are implicated by applying purely federal law” to such claims. *Id.*

11 As set out below, Plaintiff’s claims—for both compensatory and punitive  
 12 damages—survive her death under the federal common law. Accordingly, because the  
 13 result is the same under state or federal law, the Court must deny Defendants’ motion to  
 14 dismiss regardless of which body of law applies, and Plaintiff will proceed under the  
 15 assumption that federal common law applies.

#### 16 **B. Greiner’s claims for compensatory damages are unquestionably remedial**

17 As set forth above, the determination of whether Ms. Greiner’s claims survive  
 18 her death turns on whether those claims are “remedial,” “punitive” or a combination  
 19 thereof. *Wheeler*, 894 F.3d at 1057. Considering both the plain language of *Bivens* and  
 20 the nature of such claims in light of the three-part *Kilgo* test, it is clear that claims for  
 21 compensatory damages under *Bivens* are remedial and thus survive the claimant’s death.

22 Start with the language of *Bivens* itself. There, the Court clearly understood  
 23 itself to be fashioning a remedial mechanism for violations of constitutional rights,  
 24 rather than a penal scheme designed to vindicate broader societal objectives. *See Bivens*,

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25 <sup>7</sup> *Moore’s Federal Practice, Civil*, section 25.11 (2020) cites to *Carlson v. Green* in suggesting that  
 26 “federal common law governs survival of claims for damages against officers of the federal government  
 for violations of federal constitutional rights.”

1 403 U.S. at 396 (“The question is merely whether petitioner, if he can demonstrate an  
 2 injury consequent upon the violation by federal agents of his Fourth Amendment rights,  
 3 is entitled to redress *his* injury through a particular *remedial* mechanism normally  
 4 available in the federal courts.” (emphases added)). Buttressing this conclusion, Justice  
 5 Brennan wrote “[h]istorically, damages have been regarded as the ordinary remedy for  
 6 an invasion of *personal interests* in liberty.” *Id.* at 395 (emphasis added). And later, in  
 7 *Carlson*, the Supreme Court noted the important deterrent effect of *Bivens* suits, “*in*  
 8 *addition to compensating victims*.” 446 U.S. at 21 (emphasis added). In short, as one  
 9 district court recently observed, “*Bivens* itself suggests it has a remedial purpose.”  
 10 *Brunoehler*, 2020 WL 4352790 at \*1.

11 Applying the three-factor test set out in *Kilgo* yields the same result. First, the  
 12 purpose of a *Bivens* suit is decidedly to redress individual injuries at the hands of  
 13 federal agents, rather than to vindicate larger, more diffuse societal interests. *See Kilgo*,  
 14 789 F.2d at 876; *Carlson*, 446 U.S. at 18 (noting that *Bivens* permits “victims of a  
 15 constitutional violation by a federal agent. . . to recover damages”). The facts of this  
 16 case aptly illustrate the point: Plaintiff seeks to vindicate only the individual  
 17 constitutional injury suffered by Ms. Greiner from Defendants’ unconstitutional  
 18 conduct, rather than some broader interest of the community.

19 Next, recovery on Plaintiff’s claims will run directly to the individual harmed,  
 20 rather than society at large. *Kilgo*, 789 F.2d at 876. In contrast to claims under certain  
 21 federal statutory regimes (*e.g.*, *qui tam* suits) if Defendants are found liable in this case,  
 22 Ms. Greiner’s estate will recover the full amount of such damages as the jury deems  
 23 warranted, supporting the conclusion that Plaintiff’s *Bivens* claims are remedial. *See id.*

24 Finally, Plaintiff’s recovery in this matter will not be “wholly disproportionate  
 25 to the harm suffered.” *Id.* As set out below, Plaintiff maintains Ms. Greiner’s claim for  
 26 punitive damages survived her death as a special remedial sanction. That

1 notwithstanding, there is little basis for Defendants to maintain Plaintiff's claims for  
 2 *compensatory* damages could be disproportionate to the harm Ms. Greiner allegedly  
 3 suffered as the result of Defendants' actions—indeed, Defendants will presumably  
 4 demand Plaintiff produce evidence at trial establishing both the validity and extent of  
 5 Ms. Greiner's injuries, and the factfinder will be tasked with evaluating the sufficiency  
 6 of that evidence.

7 Defendants do not appear to take issue with any of the preceding analysis.  
 8 Instead, Defendants contend Ms. Greiner's death extinguished her *Bivens* claims by  
 9 attempting to stretch the well-settled “remedial vs. punitive” dichotomy to include an  
 10 additional category—“deterrent”—heretofore absent from any reported decision  
 11 applying the federal common law of survival. *See* Dkt. #196 at 13–14. Defendants  
 12 maintain the Supreme Court intended *Bivens* to act as a deterrent to unconstitutional  
 13 conduct by federal agents, and summarily conclude “[d]eterrence does not serve a  
 14 remedial purpose.” *Id.* at 13.

15 Defendants' argument, including its inherent false dichotomy, finds no support  
 16 in the case law—indeed, their motion lacks any directly-supporting precedent, instead  
 17 reasoning by analogy to wholly unrelated areas of federal law. *See* Dkt. #196 at 13.  
 18 More importantly, the argument that deterrent and remedial purposes are mutually  
 19 exclusive is directly undermined by the plain language of the Supreme Court's own  
 20 decisions. For example, the Court in *Carlson* noted “the *Bivens* remedy, *in addition to*  
 21 *compensating victims*, serves a deterrent purpose.” 446 U.S. at 21. Indeed, as the Court  
 22 there observed, “[i]t is almost axiomatic that the threat of damages has a deterrent  
 23 effect, surely particularly so when the individual official faces personal financial  
 24 liability.” *Id.* (citation omitted); *see also Bivens*, 403 U.S. at 407–08 (Harlan, J.,  
 25 concurring in judgment) (“[T]he appropriateness of according [plaintiff] compensatory  
 26 relief does not turn simply on the deterrent effect liability will have on federal official

1 conduct. Damages as a traditional form of compensation for invasion of a legally  
 2 protected interest may be entirely appropriate even if no substantial deterrent effects on  
 3 future official lawlessness might be thought to result.”).

4 In short, there is simply no basis to conclude that compensatory damages  
 5 available under *Bivens* are anything other than a core remedial sanction that, under well-  
 6 settled federal common law, survived Ms. Greiner’s death. Defendants identify no  
 7 reported decision—binding or otherwise—supporting a contrary result, and their  
 8 attempt to depart from the established analytical framework is unavailing. This Court  
 9 should thus join in the reasoning of at least two others within this Circuit and confirm  
 10 that Ms. Greiner’s *Bivens* claims for compensatory damages survived her death. *See*  
 11 *Brunoehler*, 2020 WL 4352790; *Moss*, 2020 WL 869918.

12 **C. Punitive damages under *Bivens* are a special remedial sanction, as opposed**  
 13 **to a penalty, and should also survive the Plaintiff’s death**

14 Defendants are also incorrect that Ms. Greiner’s claims for punitive damages  
 15 under *Bivens* were extinguished when she passed away. Although the general rule is  
 16 that *punitive* sanctions under a penal statute may abate upon a plaintiff’s death, the  
 17 Supreme Court’s decision in *Carlson* suggests it intended the punitive damages  
 18 component of a common law *Bivens* action to be a special remedial remedy that should  
 19 survive to a plaintiff’s estate.

20 The relevant issue before the Court in *Carlson* was whether a *Bivens* action  
 21 would survive a plaintiff’s death caused by the defendant’s allegedly unconstitutional  
 22 conduct—more specifically, whether such a claim would be subject to the federal  
 23 common law of survival (*i.e.*, that “remedial” claims survive, whereas “punitive” claims  
 24 typically do not) or to relevant state law. 446 U.S. at 23. In the course of that decision,  
 25 the Court addressed the availability of punitive damages in a *Bivens* action. *See id.* at  
 26 22. Drawing on the language of opinion in *Bivens*, the Court held that “[p]unitive

1 damages are ‘a particular *remedial* mechanism normally available in the federal  
 2 courts,’” and went on to observe that punitive damages are “especially appropriate to  
 3 *redress* the violation by a Government official of a citizen’s constitutional rights.” *Id.*  
 4 (emphases added).<sup>8</sup>

5 The Supreme Court’s careful phrasing in *Carlson* strongly implies it intended  
 6 punitive damages in the unique context of a *Bivens* action to be included among the  
 7 cause of action’s remedial sanctions, and thus to survive a plaintiff’s death under the  
 8 federal common law. *See id.* Indeed, the quoted passage appeared within the very  
 9 decision in which the Court both acknowledged the federal common law—including the  
 10 “remedial vs. punitive” dichotomy, which predated the Court’s decision, *see James*, 621  
 11 F.2d at 730 (citing *Murphy v. Household Finance Corp.*, 560 F.2d 206 (6th Cir.  
 12 1977)—and held it was applicable to *Bivens* claims. *See Carlson*, 446 U.S. at 23.  
 13 Moreover, in concluding a plaintiff’s *Bivens* claims should survive, the Court did not  
 14 parse the remedial vs. punitive distinction, holding simply that *all* the plaintiff’s claims  
 15 may be prosecuted by the estate. *Id.* at 23–25.

16 Moreover, survival of punitive damages claims is consistent with the underlying  
 17 objectives of *Bivens* and appropriate as a matter of equity. Put simply, there is simply  
 18 no justification to let a culpable defendant “off the hook” for constitutional wrongdoing  
 19 simply because they outlive their victim. Indeed, as set out above, courts have  
 20 recognized the unfairness of such a result, holding the punitive vs. remedial dichotomy  
 21 inapplicable in cases where the *plaintiff* predeceases the litigation. *See Haynes*, 2007  
 22 WL 3010574 at \*8.

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23  
 24 <sup>8</sup> Plaintiff acknowledges that one of the district courts that considered survival of a plaintiff’s *Bivens*  
 25 action in this context held that claims for punitive damages are extinguished. *See Brunoehler*, 2020 WL  
 26 4352790 at \*2. However, this decision neither engaged in a robust discussion of the matter nor addressed  
 how the Supreme Court’s holding in *Carlson* weighed into the analysis. *See id.* As such, Plaintiff  
 respectfully disagrees with this component of the *Brunoehler* court’s analysis.

Notably, each of the decisions on which Defendants rely in asserting Ms. Greiner's punitive damages claims abated on her death address federal *statutory* causes of action, such as in the context of the Americans with Disability Act and Title VII of the Civil Rights Act of 1964. *See* Dkt. #196 at 14–16. As such, these cases are all distinguishable from *Bivens* and *Carlson*, in which the Supreme Court—rather than Congress—implied the cause of action directly from the text of the Constitution. *See Bivens*, 403 U.S. at 397.

In short, the weight of authority supports the conclusion that Ms. Greiner's claims for punitive damages under *Bivens* survived her death. It is the result most consistent with the underlying objectives of such a claim and—more importantly—the result most consistent with the plain language of the Supreme Court's precedents.

## VI. CONCLUSION

Extinguishing a plaintiff's *Bivens* claims based solely on her untimely death makes little sense as a matter of common sense or constitutional jurisprudence and even less a matter of strict adherence to precedent. Indeed, all signs in the Supreme Court's prior decisions support the conclusion that both compensatory and punitive damages for violations of federal constitutional rights survive a plaintiff's death and may be prosecuted by the representative of the plaintiff's estate. Accordingly, Plaintiff respectfully requests the Court deny Defendants' motion in full.

DATED this 4<sup>th</sup> day of January, 2020

/s/ Bradley W. Andersen

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